

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

XODUS MEDICAL, INC.,)	Civil Action No. 2:23-cv-586
)	
Plaintiff,)	
)	
v.)	
)	<u>Electronically Filed</u>
THE SOULE CO., D/B/A SOULE MEDICAL,)	
)	
Defendant.)	JURY TRIAL DEMANDED

COMPLAINT

Plaintiff Xodus Medical Inc., by and through its undersigned counsel, hereby alleges the following for its Complaint against Defendant The Soule Co., d/b/a Soule Medical.

THE PARTIES

1. Plaintiff Xodus Medical, Inc. (“Xodus”) is a Pennsylvania corporation having a principal place of business at 702 Prominence Drive, New Kensington, Pennsylvania 15068.

2. Upon information and belief, Defendant The Soule Co., d/b/a/ Soule Medical (“Soule” or “Defendant”) is a Florida Corporation having a principal place of business at 4322 Pet Lane, Lutz, Florida 33559.

JURISDICTION AND VENUE

3. This is a civil action for copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et. seq.* and trademark infringement arising under the Lanham Act, 15 U.S.C. § 1051 *et seq.*

4. This Court has subject matter jurisdiction under 15 U.S.C. § 1121(a) and 28 U.S.C. § 1331 and § 1338; and this Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

5. This Court has personal jurisdiction over Soule because Soule has committed, and continues to commit, acts of trademark and copyright infringement in this district.

6. Venue is proper under 28 U.S.C. §§ 1391 and 1400 because Soule is subject to personal jurisdiction in this District since Soule's infringing and unlawful acts have occurred and are occurring in this District and Plaintiff is sustaining harm in this District as a result of Defendant's infringing acts adversely affecting Plaintiff's substantial business in this District.

FACTS

7. Xodus manufactures, markets and sells The Pink Pad® Trendelenburg Positioning System, which is a patented patient safety solution for maintaining patients in Trendelenburg surgical procedures.

8. Xodus is the exclusive licensee of several patents covering The Pink Pad® and its use.

9. The Pink Pad® was introduced into the market by Xodus in February 2012.

10. Since 2012, sales of The Pink Pad® have grown by multiple orders of magnitude.

11. The Pink Pad® is an innovative and improved solution for patient positioning, and is the clinically preferred solution for positioning patients in Trendelenburg and reverse Trendelenburg by many health care providers and networks.

12. The Pink Pad® and the color pink have come to be representative of the high quality goods offered by Xodus and the highest standard of care in Trendelenburg positioning.

13. As result, The Pink Pad® and the color pink has garnered significant goodwill in the marketplace and among the relevant consuming public. The relevant consuming public has come to associate the color pink as applied to Trendelenburg positioning pads with Xodus and as being representative of the quality of goods offered by Xodus.

14. Xodus is also the owner of several copyrights and trademarks surrounding The Pink Pad®.

15. In addition to owning trademark registrations for the word mark The Pink Pad®, Xodus is the owner of the entire right, title and interest in and to United States Trademark Registration No. 5,209,547 (“the ’547 Registration”), which states “The mark consists of the color pink as applied to a pad for an operating table to assist in maintaining patients in a Trendelenburg position.” A copy of the ’547 Registration is attached hereto as Exhibit 1.

16. The ’547 Registration identifies the following goods and services in International Class 10: “Pad for an operating table to assist in maintaining patients in a Trendelenburg position.”

17. The ’547 Registration has achieved incontestable status due to Xodus’ filing of a declaration pursuant to Section 15 of the Lanham Act, 15 U.S.C. § 1065. Because it has become incontestable, the ’547 registration constitute conclusive evidence of the validity of the registered mark and Xodus’ exclusive right to use that mark in commerce, pursuant to 15 U.S.C. § 1115(b).

18. Xodus is also the owner of the entire, right title and interest in and to United States Copyright Registration Nos. PA 2-222-047, PA 2-226-671, and PA 2-226-699. Copies of these registrations are attached hereto as Exhibits 2, 3 and 4, respectively.

19. PA 2-222-047 is a registration for an audiovisual work, entitled “The Pink Pad® - Instructions for Use,” having an effective date of registration of December 10, 2019.

20. “The Pink Pad® - Instructions for Use” video (“Xodus Video 1”) was first published on November 26, 2013 at and continues to be published at the following URL: <https://vimeo.com/80408737>. A screenshot of the webpage located at this URL is attached hereto as Exhibit 5.

21. PA 2-226-671 is a registration for an audiovisual work, entitled “The Pink Pad – Product Video,” having an effective date of registration of December 9, 2019.

22. “The Pink Pad – Product Video” (“Xodus Video 2”) was first published on November 5, 2013 at and continues to be published at the following URL: <https://vimeo.com/78675863>. A screenshot of the webpage located at this URL is attached hereto as Exhibit 6.

23. PA 2-226-699 is a registration for an audiovisual work, entitled “One-Step Trendelenburg Arm Protectors – Instructions for Use,” having an effective date of registration of December 9, 2019.

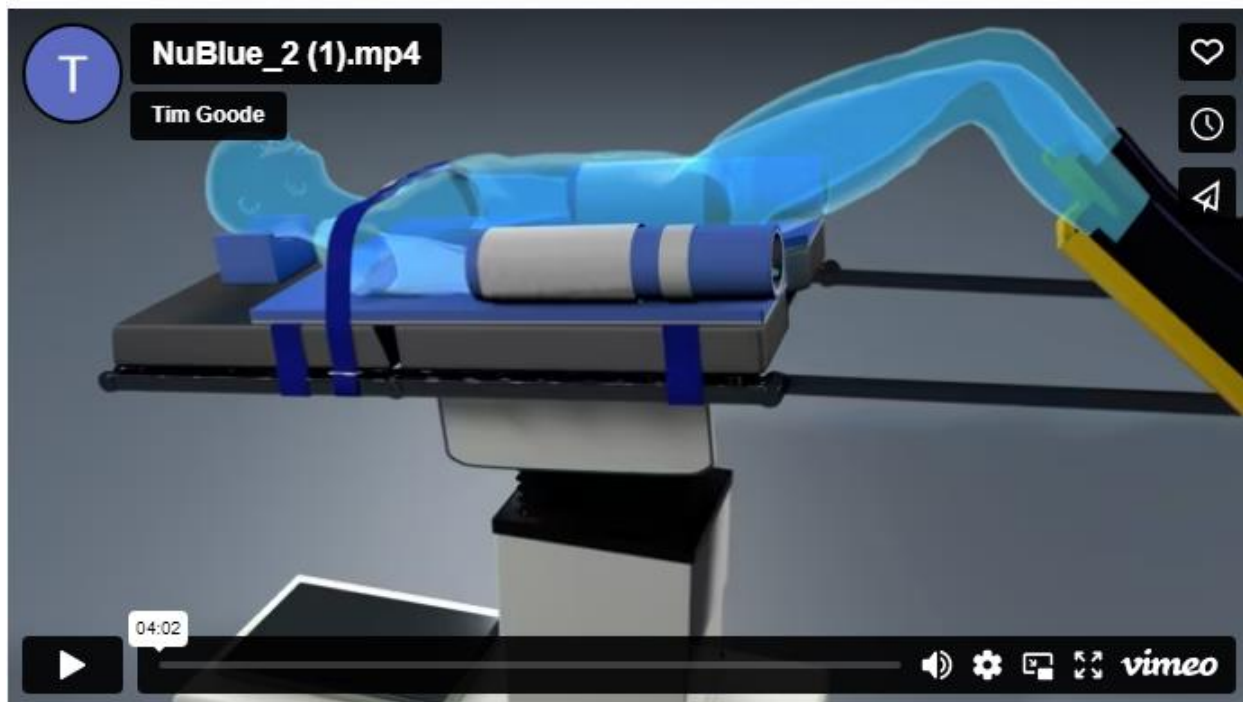
24. “One-Step Trendelenburg Arm Protectors – Instructions for Use” (“Xodus Video 3”) was first published on March 11, 2014 at and continues to be published at the following URL: <https://vimeo.com/88803068>. A screenshot of the webpage located at this URL is attached hereto as Exhibit 7.

25. Xodus Video 1, Xodus Video 2 and Xodus Video 3 (collectively, the “Xodus Videos”) were originally authored by Xodus as works made for hire.

26. Soule manufactures, markets, and sells Trendelenburg positioner pads for maintaining patients in the Trendelenburg position, such as shown at the following URL: <https://www.soulemedical.com/delxue-foam-trendelenburg-kit>. A screen shot of the webpage located at this URL is attached hereto as Exhibit 8.

27. Soule publishes and continues to publish a video at the URL identified in the immediately preceding paragraph, above, entitled “Trendelenburg Pad Instructional Video” (the “Soule Video”) relating to its own Trendelenburg pad positioner product. A still shot of the Soule Video is shown below:

Trendelenburg Pad Instructional Video



28. The Soule Video is also accessible at the following URL:
https://vimeo.com/739972693?embedded=true&source=vimeo_logo&owner=182695803.

29. Upon information and belief, Soule first published the Soule Video on August 16, 2022.

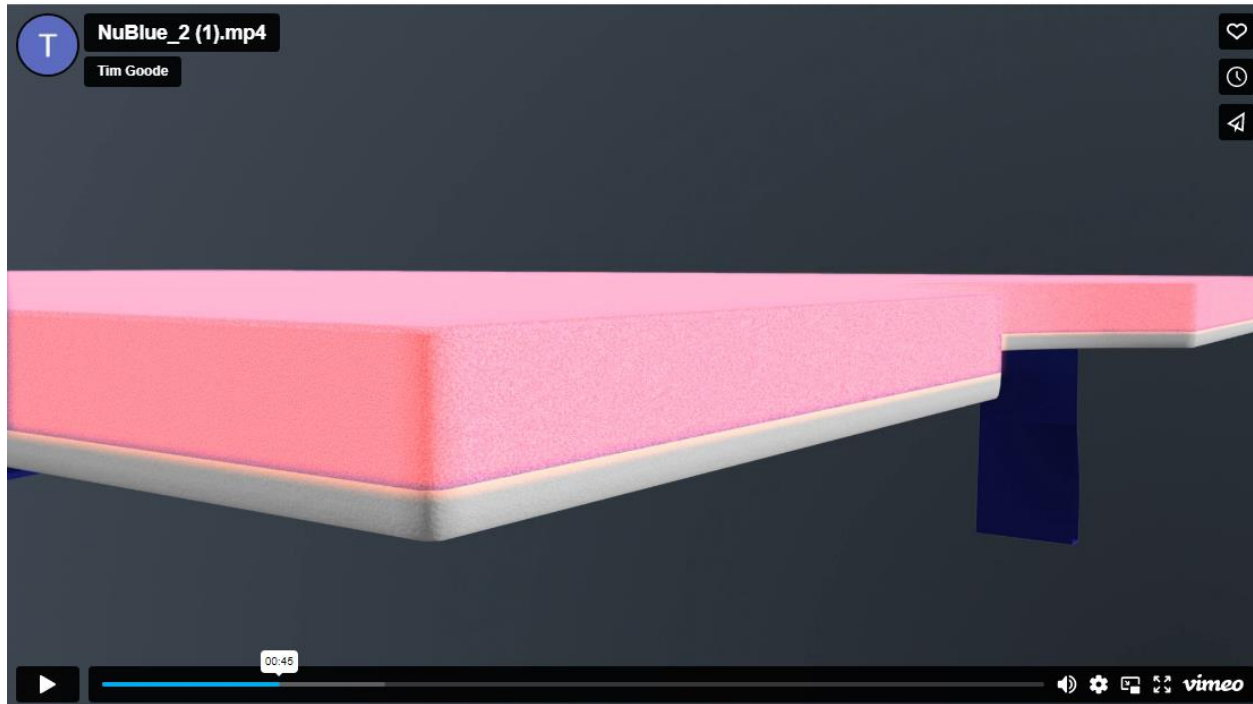
30. The Soule Video copies substantially all of Xodus Video 1, and substantial portions of Xodus Video 2 and Xodus Video 3.

31. In particular, the Soule Video copies at least substantially all of the images, language, order, and arrangement of Xodus Video 1.

32. The Soule Video utilizes identical and paraphrased language from Xodus Video 1.

33. The Soule Video also copies substantial images and language from Xodus Video 2 and Xodus Video 3.

34. Moreover, the Soule Video copies The Pink Pad®, specifically, in its video:



35. The Soule Video highlights its Trendelenburg positioning product in the color pink for an extended period of time in an attempt to trade off of the goodwill and reputation surrounding The Pink Pad® and Xodus' trademark rights in the color pink as it relates to Trendelenburg positioning systems.

36. There is no reason why Soule's Trendelenburg positioner needs to be highlighted pink over any other color in the Soule Video other than to trade on the goodwill and reputation of The Pink Pad® and Xodus' trademark rights in the color pink for Trendelenburg positioner pads.

37. Soule and Xodus market and sell their respective Trendelenburg positioner products in the same channels of trade, namely directly to medical professionals and hospitals, through third-party medical equipment distributors, and through sales representatives.

38. Soule and Xodus also both advertise their respective Trendelenburg pad positioning systems online and produce online videos to market the same.

39. The Xodus Videos and the Soule Video are both available on the online video platform, Vimeo, and Xodus' and Soule's respective websites.

40. Soule had access to the Xodus Videos at least by reason of them being publicly available at the URLs cited above.

41. Additionally, Soule was well aware of Xodus and The Pink Pad® due at least to Xodus and The Pink Pad®'s success in the market place and because Xodus previously sued Soule for infringement of its patent rights surrounding The Pink Pad.

42. Accordingly, Soule's copying of the Xodus Videos and The Pink Pad® was intentional and deliberate. Soule's copying was done in order to deceive the relevant consuming public that Soule is somehow associated with Xodus and/or The Pink Pad®.

43. Soule intends that the Soule Video evokes Xodus and The Pink Pad® in the mind of the relevant consuming public.

Count I
(Copyright Infringement under 17 U.S.C. § 501)

44. Xodus incorporates by reference herein the averments set forth in all preceding paragraphs of this Complaint as if set forth herein in their entirety.

45. Soule copied substantial and material portions of Xodus Video 1 in producing and publishing the Soule Video.

46. Xodus Video 1 is registered at U.S. Copyright Registration No. PA 2-222-047.

47. Soule copied substantial and material portions of Xodus Video 2 in producing and publishing the Soule Video.

48. Xodus Video 2 is registered at U.S. Copyright Registration No. PA 2-226-671.

49. Soule copied substantial and material portions of Xodus Video 3 in producing and publishing the Soule Video.

50. Xodus Video 3 is registered at U.S. Copyright Registration No. PA 2-226-699.

51. Soule knowingly, willfully, and intentionally copied the Xodus Videos for commercial advantage and gain and has infringed and continues to infringe the copyrights of Xodus in the Xodus Videos, including U.S. Copyright Registration Nos. PA 2-222-047, PA 2-226-671, and PA 2-226-699.

52. Soule's conduct constitutes copyright infringement under 17 U.S.C. § 501(a).

53. As a direct result of Soule's actions, Xodus has lost income and profits and will continue to lose income and profits. On information and belief, as a direct and proximate result of its wrongful conduct, Soule has realized and continues to realize profits and other benefits rightfully belonging to Xodus. Accordingly, Xodus seeks an award of damages pursuant to 17 U.S.C. §§ 504 and 505.

54. Further, however, Xodus is entitled to recover statutory damages under 17 U.S.C. § 504(c). Because Soule has acted knowingly, willfully, and intentionally and with conscious disregard for Xodus' rights in the Xodus Videos, Xodus is entitled to the maximum allowable statutory damages of \$150,000 per work infringed.

55. Further, Xodus is entitled to its attorneys' fees under 17 U.S.C. § 505.

56. Xodus has been irreparably damaged and will continue to be irreparably damaged by reason of Soule's copyright infringement unless this Court restrains the infringing acts of Soule. Xodus is without an adequate remedy at law.

Count II
(Trademark Infringement of U.S. Reg. No. 5,209,547 under 15 U.S.C. § 1114)

57. Xodus incorporates by reference herein the averments set forth in all preceding paragraphs of this Complaint as if set forth herein in their entirety.

58. Xodus is the owner of the '547 Registration for “the color pink as applied to a pad for an operating table to assist in maintaining patients in a Trendelenburg position” in connection with the following goods: “Pad for an operating table to assist in maintaining patients in a Trendelenburg position.” *See* Exhibit 1.

59. Xodus has been using the color pink on the identified goods in interstate commerce at least since February 2012. Xodus has thus developed extensive goodwill and recognition as the source of pink pads for use on operating tables to assist in maintaining patients in the Trendelenburg and similar positions.

60. Soule uses the color pink on its Trendelenburg positioning pad in the Soule Video without permission or license from Xodus.

61. Soule’s use of the color pink in this manner is likely to cause confusion, or to cause mistake, or to deceive consumers of Soule’s products that Soule and/or its products are created, sponsored, endorsed, authorized, or licensed by or otherwise associated with Xodus and/or The Pink Pad®.

62. Soule’s conduct in this regard is knowing, willful, and deliberate, and designed specifically to trade upon the enormous goodwill associated with Xodus’ federally registered “pink color” mark.

63. The above-described acts of Soule constitute trademark infringement of Xodus’ U.S. Trademark Registration No. 5,209,547 in violation of 15 U.S.C. § 1114(1), entitling Xodus to relief.

64. Xodus has been, and is likely to continue to be, irreparably harmed and damaged by Soule’s willful acts of trademark infringement if Soule is not restrained, in that Xodus has suffered and is likely to suffer a loss of sales and profits and a destruction of goodwill each time

customers believe that Soule's products are created, sponsored, endorsed, authorized, licensed or otherwise associated with Xodus and/or The Pink Pad®.

65. Soule's conduct has also irreparably harmed, and if not enjoined, will continue to irreparably harm the consuming public who has an interest in being free from confusion, mistake and deception.

66. By reason of Soule's acts alleged herein, Xodus' remedy at law is not adequate to compensate Xodus for the injuries inflicted by Soule. Accordingly, Xodus is entitled to preliminary and permanent injunctive relief against Soule pursuant to 15 U.S.C. § 1116.

67. By reason of Soule's willful acts, Xodus is entitled to damages, and those damages should be trebled, under 15 U.S.C. § 1117.

68. This is an exceptional case, making Xodus eligible for an award of attorneys' fees under 15 U.S.C. §1117.

Count III

(False Designation of Origin/Trademark Infringement under 15 U.S.C. § 1125(A))

69. Xodus incorporates by reference herein the averments set forth in all preceding paragraphs of this Complaint as if set forth herein in their entirety.

70. Xodus is the exclusive owner of the color pink as applied to a pad for an operating table to assist in maintaining patients in a Trendelenburg position.

71. Soule's use of the color pink to color its Trendelenburg positioning pad in the Soule Video without permission or license from Xodus is likely to cause confusion, or to cause mistake, or to deceive consumers of Soule's products that Soule and/or its products are created, sponsored, endorsed, authorized, licensed or otherwise associated with Xodus and/or The Pink Pad®.

72. Soule's conduct in this regard is knowing, willful and deliberate, and designed specifically to trade upon the enormous goodwill associated with Xodus' federally registered "pink color" mark.

73. Soule's use of the infringing pink color in this regard constitutes a false designation of origin which is likely to deceive consumers into believing that Soule's goods and services are those of Xodus or are sponsored, endorsed, authorized, or licensed by or otherwise associated with Xodus and/or The Pink Pad®. As a consequence, Soule's conduct is likely to divert customers away from Xodus.

74. The above-described acts of Soule constitute trademark infringement of Xodus' pink color mark, and false designation of origin in violation of 15 U.S.C. § 1125(a), entitling Xodus to relief.

75. Soule has unfairly profited from the actions alleged in an amount to be determined at trial.

76. By reason of Soule's acts alleged herein, Xodus has suffered damage to the goodwill associated with its pink color mark.

77. Soule's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm Xodus and Xodus' pink color mark.

78. Soule's activities have irreparably harmed and, if not enjoined, will continue to irreparably harm the relevant consuming public, which has an interest in being free from confusion, mistake and deception.

79. Soule's actions will cause Xodus to lose the benefit of the substantial investment made in developing, marketing, and selling its goods. Soule's improper actions are intended to cause harm to Xodus.

80. By reason of Soule's acts alleged herein, Xodus' remedy at law is not adequate to compensate Xodus for the injuries inflicted by Soule. Accordingly, Xodus is entitled to preliminary and permanent injunctive relief against Soule pursuant to 15 U.S.C. § 1116.

81. By reason of Soule's willful acts, Xodus is entitled to damages, and those damages should be trebled, under 15 U.S.C. § 1117.

82. This is an exceptional case, making Xodus eligible for an award of attorneys' fees under 15 U.S.C. §1117.

83. Soule's false designation of origin and trademark infringement will continue unless enjoined by this court.

Count IV
(Common Law Unfair Competition)

84. Xodus incorporates by reference herein the averments set forth in all preceding paragraphs of this Complaint as if set forth herein in their entirety.

85. Soule's copyright and trademark infringement as herein alleged constitutes unfair competition by Soule, who is interfering with and depriving Xodus of its rights in and to the copyrighted Xodus Videos and Xodus' pink color mark, and falsely associating Soule's products with Xodus, Xodus' pink color mark and The Pink Pad®, resulting in immediate and irreparable damage to Xodus and its ability to commercially profit from its copyrights, trademarks, and associated goodwill.

86. As the direct and proximate result of Soule's infringement and unfair competition as herein alleged, Xodus has been and will continue to be irreparably, materially, and substantially harmed and damaged.

PRAYER FOR RELIEF

WHEREFORE, Xodus prays that this Court enter Judgment against Soule as follows:

- a. that Soule, its officers, employees, agents, and those persons in active participation with them be preliminarily and permanently enjoined from infringing Xodus' registered copyrights in the Xodus Videos, Xodus' United States Trademark Registration No. 5,209,547 and Xodus' pink color mark under the Lanham Act and common law;
- b. that Soule be adjudged to infringe Xodus' copyrights in the Xodus Videos, registered at U.S. Copyright Registration Nos. PA 2-222-047, PA 2-226-671, and PA 2-226-699, United States Trademark Registration No. 5,209,547, and Xodus' pink color mark under the Lanham Act and common law and that Soule committed such infringement willfully;
- c. that Soule be ordered to pay damages to Xodus for any and all profits derived by reason of the copyright infringement and trademark infringement acts complained of in this Complaint and/or statutory damages pursuant to 17 U.S.C. § 504 and 15 U.S.C. §§ 1114, 1117 and 1125;
- d. that Soule be ordered to pay to Xodus treble damages pursuant to 15 U.S.C. § 1117(b), resulting from Soule's willful infringement of Xodus' trademark rights;
- e. that Soule be ordered to pay to Xodus monetary damages incurred by Xodus in an amount to be determined at trial;
- f. that Soule be ordered to pay costs and reasonable attorneys' fees as provided by 17 U.S.C. §505, 15 U.S.C. § 1117, and/or common law; and
- g. that Xodus be awarded such further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Xodus hereby demands a trial by jury for all issues triable by a jury.

Respectfully submitted,

THE WEBB LAW FIRM

Dated: April 6, 2023

s/ Kent E. Baldauf, Jr.
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